



Date: March 19, 1998
Case No. 97-INA-155

In the Matter of:

MARCELLO'S PIZZA,
Employer,

on behalf of

GIOVANNI CERIMELE,
Alien.

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification.¹ Employer is a restaurant/pizzeria seeking to fill a cook position. (AF 45)² The only issue for review is whether Employer's requirement of two years of experience in the job offered is unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2).

Background

Employer believes that the position is best described by the Dictionary of Occupational Titles (DOT) definition for "Cook, Specialty, Foreign Food" (313.361-030) That job definition has a Specific Vocational Preparation (SVP)³ of "7" — over 2 years up to and including 4 years.

¹The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").

²"AF" is an abbreviation for "Appeal File".

³"Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed

The CO, however, concluded that the position is best described by the DOT definition for "Cook, Speciality," (313-361-026), which has a SVP of 5 — over 6 months up to and including 1 year.⁴

The DOT definitions for these positions are:

313.361-026 COOK, SPECIALTY (hotel & rest.)

Prepares specialty foods, such as fish and chips, tacos, and pasties (Cornish meat pies) according to recipe and specific methods applicable to type of cookery. May serve orders to customers at window or counter. May prepare and serve beverages, such as coffee, clam nectar, and fountain drinks. May be required to exercise showmanship in preparation of food, such as flipping pancakes in air to turn or tossing pizza dough in air to lighten texture. May be designated according to food item prepared as Cook, Fish And Chips (hotel & rest.).

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313.361-030 COOK, SPECIALTY, FOREIGN FOOD (hotel & rest.)

Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.).

GOE: 05.10.08 STRENGTH: M GED: R3 M3 L2 SVP: 7 DLU: 77

In the ETA 750A, the job duties are described as "Cook and prepare a variety of Italian style dishes such as antipasto, lasagna, stuffed shells, manicotti, ravioli with different sauces, veal, chicken and eggplant parmigiana." (AF 45)

Employer titles itself "Marcello's Pizza." (AF 34) Its menu reveals, however, that more

for average performance in a specific job-worker situation." Dictionary of Occupational Titles, Appendix C (4th Ed., Rev. 1991).

⁴In the Notice of Findings, the CO proposed that the position constituted a combination of three DOT definitions — Cook, Specialty; Baker, Pizza; and Sandwich Maker — all having a SVP of 5 or less. (AF 23) In the FD, however, the CO settled on the Cook, Specialty definition. (AF 6).

than just pizza is offered. Rather, the menu also includes standard Italian dinners such as lasagna, stuffed shells, manicotti, ravioli, various parmigiana dishes and spaghetti. (AF 34) In addition, Employer offers salads, stromboli, subs, "oven grinders," and hamburgers. (AF 34-35) Employer's owner submitted an affidavit on rebuttal indicating that the "chef" position he is offering is not some employee who is limited to cooking things like fish and chips or tacos, who serves customers, who serves or prepares beverages, or who is expected to provide a show for customers. (AF 10-11) In addition, in the affidavit employer's owner maintains that it is not a mere fast food operation. The affidavit concedes that "[i]t does not take skill to open a jar of Ragu and add frozen meatballs to pre-packaged pasta." Employer's owner, however, asserted that the position requires daily preparation of marinara and meat sauces and handmade pastas; preparation of delicate manicotti shells unlike supermarket varieties; daily preparation of 25 to 50 serving a lasagna; cutting of veal; handmade preparation of dough; daily preparation of antipasto; the ability to respond to special requests of customers. Finally, the affidavit indicates that daily pasta specials are offered that include made-to-order sauces such as pesto, mushroom, garlic and clam (white and/or red). (AF 12-13) Also included in Employer's rebuttal were photographs of the restaurant's dining area. (AF 15-16)

The CO was not convinced by this documentation, and issued a Final Determination finding that "[t]o suggest that [the position offered] is similar to a full fledged cook, requiring 2 years of experience, simply because a couple of pasta dishes are served, is without merit." (AF 6)

Discussion

The regulations provide, in pertinent part, that

(2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:

(i) The job opportunity's requirements, unless adequately documented as arising from business necessity:

(A) Shall be those normally required for the job in the United States;

(B) Shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.) including those for subclasses of jobs....

20 C.F.R. § 656.21(b)(2). The DOT is merely a guideline and should not be applied mechanically. *Promex Corp.*, 89-INA-331 (Sept. 12, 1990). Merely because the duties of the job offered require some, but not all, of the duties included in a particular DOT classification does not nullify the applicability of that classification. *Trilectron Industries, Inc.*, 90-INA-188 (Dec. 19, 1991).

In the instant case, we agree with Employer that it is offering a position that is more than a mere fast-food cook that appears to be described by the DOT definition for "Cook, Specialty." We also agree, however, with the CO, that the position does not appear to be properly

categorized as requiring the kind of skill and experience needed to perform the position described by the DOT definition for "Cook, Specialty, Foreign Food." Specifically, there is no indication that the position offered involves any menu planning, or responsibilities for estimating food consumption and requisitions or purchasing supplies. Although it is not necessary that a particular position exactly match the DOT definition in respect to all duties, the "Cook, Specialty, Foreign Food" definition strongly suggests that the relatively long experience requirement is related to special skills in the kitchen — both in regard to food preparation and to kitchen administration.

A review of the DOT cook definitions does not reveal any definition that readily fits the position offered — a cook of standard Italian fare who does not appear to have significant administrative responsibilities in the kitchen. Accordingly, we will consider whether the two years of experience in the job offered has been justified by business necessity. The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show:

- (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and
- (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

Employer's business necessity argument is that it not merely a fast-food restaurant; it has a 1,000 square foot kitchen, and has seating capacity for 116 customers; that the cook does not handle duties such as counter service, pizza making and prep work, and sandwich maker. *See* Appeal Brief at 4. We find that an experience requirement bears a relationship to the position of cook in the context of an Italian restaurant. We do not find, however, that there is sufficient documentation in this record to establish that two years of experience are essential to a cook's performing, in a reasonable manner, the job duties described — preparation and cooking of standard Italian dinners. Although Employer's position is not a mere fast food cook, we do not find Employer's affidavit persuasive to establish that two years of experience are required for an employee to be able to prepare and cook fare such as "antipasto, lasagna, stuffed shells, manicotti, ravioli with different sauces, veal, chicken and eggplant parmigiana."

We wish to emphasize that this decision is based solely on the record made in this application. We do not mean to denigrate the skill and experience needed for Italian cooking, and we do not find that an Italian fare has become so standardized that it cannot be considered a foreign specialty food, or that an Italian/American restaurant could not establish a need for a cook with two years of experience in preparation and cooking of Italian fare. We observe, however, that two years of experience is a relatively long time to require of a cook of standard fare, and that a restaurant owner's recitation of the dishes and sauces prepared does not establish why a lengthy experience requirement is necessary. Rather, Employer would need to provide detailed documentation as to how its specific duties require two years of experience in order to

perform those duties.

ORDER

The denial of labor certification is AFFIRMED.

Entered at the Direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.